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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CAR CARRIERS, INC., *et al.*,
Petitioners,

v.

FORD MOTOR COMPANY and
NU-CAR CARRIERS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENT NU-CAR CARRIER, INC.'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals in affirming the dismissal of an antitrust claim which did not assert a *per se* violation and did not allege any facts constituting injury to competition committed any legal error that calls for the exercise of this Court's jurisdiction.

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STATEMENT

Respondent Nu-Car Carriers, Inc. ("Nu-Car")[1] respectfully requests that this Court deny the Petition for Certiorari, docketed January 25, 1985, seeking review of a decision by the United States Court of Appeals for the Seventh Circuit affirming the dismissal of an antitrust complaint filed by petitioners (collectively referred to as "Car Carriers").

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[1] Pursuant to Rule 28.1, Nu-Car states its parent corporation is the Lishon Corporation, a Pennsylvania corporation, and it has no publicly-owned affiliates or subsidiaries.

This case fundamentally involves a disappointed bidder's claim that a purchaser of transportation services, Ford Motor Company ("Ford"), conspired with Nu-Car, another bidder, to eliminate the previous service vendor, Car Carriers, and to violate the antitrust laws. As the Seventh Circuit realized, "when stripped to its essential allegations, the complaint does no more than state plaintiff's commercial disappointment at losing [Ford's] patronage." [2]

The complaint alleged that Car Carriers transported new Ford vehicles from Ford's plants and railheads in the Chicago area to Ford dealerships in that area from 1968 until October 1981. According to the complaint, Ford had the power to "dictate and control" the rates charged by Car Carriers and others either by formally opposing any rate increase sought before the federal or state regulatory agencies or by unilaterally terminating the carriers. Complaint ¶¶ 19(d)-(g), Pet. App. at A37.

The complaint charged that in as early as 1975 defendants and their co-conspirators engaged in a conspiracy to restrain trade in the business of providing haulaway motor transportation for new Ford automobiles and to injure or destroy the business of Car Carriers and certain other similarly situated Ford carriers. *Id.* at ¶ 19. The defendants purportedly employed several methods of implementing their common goal. First, Ford required the carriers selected for elimination (the so-called "target carriers") to make substantial investments in new tractor-trailer equipment, real estate and new terminal facilities. In return, Ford would promise additional transportation traffic and "complete agreement with increased tariff rates necessary to pay for these acquisitions." Complaint ¶¶ 19(b), (c), Pet. App. at A36-37. After the target carriers made these investments, however, Ford

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[2] Pet. App. at A16, *quoting* Dunn & Mavis, Inc. v. Nu-Car Drivaway, Inc., 691 F.2d 241, 243 (6th Cir. 1982).

allegedly would then prevent them from obtaining the rate increases necessary for profitable operations. *Id.* at ¶¶ 19(d), (e), Pet. App. at A37.

Second, Ford purportedly interfered and prevented the target carriers from selling businesses and assets and preventing mergers that were in their business interests. *Id.* at ¶ 19(h). Finally, Ford would terminate its relationship with the target carrier, thereby allowing favored carriers to acquire the business at distress prices or for less than fair market value as going business concerns. *Id.* at ¶ 19(i).

The complaint asserted that Car Carriers was destroyed following this pattern. In 1975, Ford directed Car Carriers to sell assets and businesses to a second Ford carrier. Car Carriers allege that Ford unreasonably interfered with and prevented the consummation of this supposed agreement. Complaint, ¶ 20(a), Pet. App. at A38. In 1977 and 1978, Ford induced Car Carriers to purchase $6 million of new equipment. *Id.* at ¶ 20(b). However, Ford purportedly caused Car Carriers' operations in Chicago to be unprofitable through its refusal to allow adequate published tariff rates or other compensation. *Id.* at ¶ 20(g), Pet. App. at A39.

In 1981, Ford solicited bid proposals for Chicago's haulaway business from Car Carriers and other car transporters. In October of 1981, Ford awarded the haulaway contract for the Chicago area to Nu-Car and terminated Car Carriers. According to the complaint, this was on the basis of Nu-Car's "sham and knowing predatory bid." *Id.* at ¶ 20(e), Pet. App. at A38-39. To minimize the losses from the termination, Car Carriers attempted to sell their facilities and other assets to Nu-Car. However, the effort was frustrated when Ford and Nu-Car purportedly insisted on "walkaway and other onerous provisions . . . as well as unacceptable covenant releases of Car Carriers claims." *Id.* at ¶ 20(i), Pet. App. at

A39. These allegations are the heart of Car Carriers' complaint, particularly against Nu-Car.

Both defendants moved to dismiss the complaint for failure to state a claim. The District Court granted the motion under Federal Rule of Civil Procedure 12(b)(6) with prejudice. Pet App. at A21-30.

The Seventh Circuit affirmed. While recognizing that summary procedures should be used sparingly in antitrust litigation, it refused to provide such litigation an exemption from Federal Rule of Civil Procedure 12(b)(6).[3] The court realized that the "fundamental requirement at issue in this dispute is that of a sufficient allegation of anticompetitive effects that would result or have resulted from the defendants' actions." Pet. App. at A10.

The court indicated that the only exception to the requirement is when the plaintiff adequately states a *per se violation.* (Pet. App. at A11.) The Seventh Circuit examined the complaint and found that plaintiffs had not "alleged a price fixing scheme, and price-cutting by Car Carriers was in no way a factor in its dispute with Ford. (Pet. App. at A12.) In fact, "the market structure described in the complaint is not analogous to a hierarchy of manufacturers, distributors, or resellers. Ford is simply a purchaser of hauling services and the plaintiffs are sellers of those services." Pet. App. at A3.

The court refused to accept the *per se* labels that Car Carriers attempted to paste onto the complaint. The Court recognized that

> The complaint simply states that Ford elected to replace its exclusive haulaway transporter for the Chicago area with another carrier on the ground that the original carrier continually sought higher prices then Ford was willing to pay. Ford obviously entered into an initial "agreement" with Nu-Car that

[3] Pet. App. at A8-9.

> resulted in the elimination of Car Carriers, but the same could be said of any similar exclusive arrangement when the original supplier of services is replaced by another.

Id. The fact that no one purchased Car Carriers' assets after their termination by Ford was also found by the court to be insufficient to constitute a refusal to deal for antitrust purposes. Pet. App. at A13-14.

The Seventh Circuit then analyzed the complaint under the rule of reason and found no anticompetitive effects: "Losing business to a competitor is an inevitable consequence of the economic system." Pet. App. at A14. The court recognized that Car Carriers was "alleging, in essence, that Ford conspired to injure itself." Pet. App. at A15. The court concluded that the finding that the complaint stated a Section 1 claim would severely limit "a buyer's right to displace an old seller in favor of a new one" and "would undermine the principles of competition the antitrust laws were designed to secure." [4]

REASONS THE WRIT SHOULD NOT BE GRANTED

Put bluntly, the Petition for Writ of Certiorari is frivolous and does not require the devotion of this Court's limited resources. Car Carriers allege that the Seventh Circuit erroneously required them to allege injury to competition to state an antitrust claim under the Rule of Reason. Second, they claim that the court below disregarded this Court's teachings in *Conley v. Gibson*, 355 U.S. 41 (1957) and *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962) in dismissing the complaint under Federal Rule of Civil Procedure 12(b)(6). Car Carriers' tortured arguments have no merit.

I. The major thrust of Car Carriers' petition is that the decision below directly conflicts with this Court's decisions in *Radiant Burners, Inc. v. Peoples Gas Light*

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[4] Pet. App. at A16, *quoting* Dunn & Mavis, *supra*, 691 F.2d at 244.

and Coke Company, 364 U.S. 656 (1961), *Klor's v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), and *Radovich v. National Football League*, 352 U.S. 445 (1957) by requiring a plaintiff in a non-*per se* case to allege injury to the market, *i.e.*, injury to competition.

To the contrary, the Seventh Circuit merely followed this Court's admonition that the antitrust laws were designed to protect competition, not merely competitors. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *see also* Pet. App. at A14. It is now clear beyond peradventure that when a claim is judged under the rule of reason, it requires a determination whether the alleged practice constitutes an unreasonable restraint on competition. *See, e.g., Monsanto Company v. Spray-Rite Service Corp.*, —— U.S. ——, 104 S. Ct. 1464, 1469 (1984); *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, —— U.S. ——, 103 S. Ct. 897 (1983); *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

The cases Car Carriers invoke all involved *per se* violations. *Klor's, supra*, involved a *per se* violation of the antitrust laws—a group boycott—a practice as to which "Congress had determined its own criteria on public harm and it was not for the courts to decide whether in an individual case injury had actually occurred." 359 U.S. at 211. *Radiant Burners, supra*, relied upon *Klor's* and again involved a *per se* violation, which is why this Court forebore analysis of plaintiffs' averments of adverse market impact. 364 U.S. at 659-60. Finally, *Radovich, supra*, also involved a group boycott constituting *per se* violations. 352 U.S. at 453.

In the last paragraph of their first point, Car Carriers attempt to suggest that they had asserted a *per se* claim in the allegations that other carriers "boycotted" the sale of their property after they lost the Chicago business.

(Pet. App. at A9.) The refusal to buy property is simply not "an effort to exclude or cause disadvantage to one or more competitors by cutting them off from trade relationships which are necessary to any firm trying to compete." L. Sullivan, *Handbook of the Law of Antitrust*, 260 (1977).

II. Stripped to its essence, Car Carriers' second argument is that the antitrust laws constitute an exception to Federal Civil Procedure 12(b)(6). That is the only way the Seventh Circuit opinion could be "in conflict" with this Court's *Conley* and *Poller* decisions.

The actual facts are otherwise. The Seventh Circuit recognized the standards set forth in those decisions, gave Car Carriers the benefit of all inferences, but still required an actual claim be stated. In so doing, it followed the Fifth Circuit's apt characterization that "a complaint . . . must contain direct or influential allocations respecting all the material elements necessary to sustain a recovery under *some* viable legal theory." *In re* Plywood Antitrust Litigation, 655 F.2d 627, 641 (5th Cir. 1981), *cert. dismissed*, —— U.S. ——, 103 S. Ct. 3100 (1983); *see* Pet. App. at 8.

From the beginning, Car Carriers' antitrust claim has had several bizarre elements. It defined a market in which one co-conspirator, Ford, is not only the sole consumer in the relevant market, but also has sufficient economic power to dictate the terms of its dealings with all its carriers, targets and co-conspirators alike. Nonetheless, Car Carriers allege that Ford conspired to injure itself and that the overt act in furtherance of that so-called conspiracy was one of protecting its own economic interest and terminating Car Carriers in order to lower its own transportation costs. As the courts below found, Car Carriers' *own* affirmative allegations demonstrated conclusively that their alleged injury is not of the type of anticompetitive injury the antitrust laws were intended to forestall.

CONCLUSION

The Petition for a Writ of Certiorari should not be granted.

Respectfully submitted,

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